

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TANYA G. BEVERLY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner
of Social Security,¹

Defendant.

Case No. C12-811-JLR-BAT

**REPORT AND
RECOMMENDATION**

Tanya G. Beverly seeks review of the denial of her Supplemental Security Income and Disability Insurance Benefits applications. She contends that the ALJ erred by (1) failing to adequately develop the record; (2) failing to account for Ms. Beverly's knee arthritis and effusion and obesity at step two and when assessing her residual functional capacity ("RFC"); (3) failing to properly assess the medical evidence; and (4) failing to properly evaluate the opinion of consultative examiner Richard Coder, Ph.D. Dkt. 15 at 2-3.² As discussed below, the Court

¹ On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of Social Security. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the Defendant in this suit.

² Ms. Beverly lists two other assignments of error that do not merit a full discussion. First, Ms. Beverly alleges that the ALJ considered only "objective" medical evidence when evaluating her mental impairments, and should have considered other evidence. The written decision confirms that the ALJ considered all relevant evidence; his reference to a lack of "objective" medical

1 recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings
 2 pursuant to sentence four.

3 **FACTUAL AND PROCEDURAL HISTORY**

4 Ms. Beverly is currently 54 years old, has a high school degree and completed two years
 5 of college, and has worked as a phlebotomist, office clerk, hazmat technician, school bus driver,
 6 sales associate, and veterinarian assistant.³ On September 16, 2008, she applied for benefits,
 7 alleging disability as of June 28, 2006. Tr. 123-32. Her applications were denied initially and on
 8 reconsideration. Tr. 59-65, 68-71. The ALJ conducted a hearing on June 9, 2010 (Tr. 31-54),
 9 finding Ms. Beverly not disabled. Tr. 17-26. As the Appeals Council denied Ms. Beverly's
 10 request for review, the ALJ's decision is the Commissioner's final decision. Tr. 1-6.

11 **THE ALJ'S DECISION**

12 Utilizing the five-step disability evaluation process,⁴ the ALJ made the following
 13 findings:

14 **Step one:** Ms. Beverly had not engaged in substantial gainful activity June 28, 2006.

15 **Step two:** Ms. Beverly's major depressive disorder (recurrent without psychotic
 16 features) and borderline personality disorder are severe impairments.

17 **Step three:** These impairments did not meet or equal the requirements of a listed
 18 impairment.⁵

RFC: Ms. Beverly can perform a full range of work at all exertional levels, with the

19 evidence is consistent with his conclusion that Ms. Beverly's self-reported symptoms are not
 20 credible. Tr. 23. Ms. Beverly does not identify an error here with any specificity, and the Court
 will not further analyze this issue. *See generally Carmickle v. Commissioner*, 533 F.3d 1155,
 1161 n.2 (9th Cir. 2008) (declining to address issues not argued with any specificity).

21 Second, Ms. Beverly's final assignment of error is a catch-all argument that the ALJ's
 22 decision is not supported by substantial evidence. She provides no new argument in this section,
 but instead reiterates arguments made in previous sections. Thus, the Court will not separately
 address this assignment of error.

23 ³ Tr. 35, 123, 149, 168.

⁴ 20 C.F.R. §§ 404.1520, 416.920.

⁵ 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 following nonexertional limitations: Ms. Beverly can have limited contact with others
 2 (i.e., perform work that does not involve interdependent tasks); she can perform simple
 repetitive tasks; and she can work in a predictable work environment.

3 **Step four:** Ms. Beverly could perform her past work as a packer. This work does not
 4 require the performance of work-related activities precluded by her RFC.

5 **Step five:** In the alternative, Ms. Beverly can transition to other work, such as shellfish
 shucker, injection molding machine tender, and grain picker. Because Ms. Beverly can
 6 perform jobs that exist in significant numbers, she is not disabled.

7 Tr. 14-26.

8 **DISCUSSION**

9 **1. The ALJ Did Not Breach His Duty to Develop the Record.**

10 Ms. Beverly was not represented at the administrative hearing, and contends that in light
 of that circumstance, the ALJ should have provided a more expansive opportunity for her to
 11 identify her impairments and explain how they prevent her from working. Early in the
 12 administrative hearing, the ALJ asked Ms. Beverly why she could no longer work as a
 13 phlebotomist, and she responded with a description of her mental impairments. Tr. 36. Later on,
 14 the ALJ provided her with an opportunity to address any issue that had not yet been covered:

15 [ALJ]: Is there anything that I haven't asked you or that we haven't
 16 touched on which reflects on your capacity to work?

17 [Ms. Beverly]: I have no idea?

18 [ALJ]: Well, if you think of anything, you can write me a letter and let me
 know if there is something you've missed. In addition, when I get the additional
 19 evidence to bring your record up to date, we will be sending you copies of that
 material so you can make any comments that you want. So, if you've thought of
 anything in the interim, you can include that[.]

20 Tr. 46. According to Ms. Beverly, her unfamiliarity with the process and her failure to mention
 21 any physical impairments during the administrative hearing should have triggered the ALJ's duty
 22 to inquire about any physical impairments. Dkt. 17 at 2-3.

23 The parties agree that an ALJ has a heightened duty to develop the record if a claimant is

unrepresented. *See* Dkt. 15 at 3 (citing *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003)); Dkt. 16 at 12 (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)). But the parties disagree as to whether the ALJ met that duty in this case. The Commissioner points to all the forms Ms. Beverly completed in the process of applying for disability benefits, which provided her an opportunity to specify her disabling physical impairments she now contends were ignored by the ALJ. *See, e.g.*, Tr. 148 (not listing physical impairments in response to “What are the illnesses, injuries, or conditions that limit your ability to work?” in a disability report), 205 (the same, in the disability appeal report). That she failed to identify physical impairments in her forms suggests that she may not have identified them upon further questioning during the hearing, because she did not apparently connect any physical limitations with her disability allegations.

And in any event, the ALJ considered the medical evidence related to Ms. Beverly’s knee impairments in his step-two findings (Tr. 20); the sufficiency of those findings will be discussed in the following section. Because the ALJ demonstrated an awareness of the full, unambiguous record in Ms. Beverly’s case and did not suggest that the evidence was insufficient, and because Ms. Beverly did not provide any indication that her physical impairments were disabling at any point during the proceeding until this appeal, the ALJ’s duty to inquire was not triggered. *See Tonapetyan*, 242 F.3d at 1150 (“Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an appropriate inquiry.’” (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996))).

2. The ALJ Did Not Err With Respect to Ms. Beverly’s Knee Impairments or Obesity.

Ms. Beverly contends that the ALJ should have found her knee impairments and her obesity to be severe at step two, and/or to account for limitations caused by those impairments in

1 the RFC assessment. Though Ms. Beverly implicitly admits that the medical evidence related to
2 her knee impairment and obesity do not establish that these impairments were severe, Ms.
3 Beverly cites references in the record to her self-reported difficulty standing and walking, and
4 thus the ALJ should have inquired as to whether Ms. Beverly had physical impairments that
5 caused those difficulties. Dkt. 17 at 4.

6 For the reasons explained in the previous section, the ALJ did not breach his duty to
7 inquire in this case. The ALJ noted that Ms. Beverly had been diagnosed with arthritis in her left
8 knee, and also cited 2009 imaging evidence after a fall showing “no acute osseous abnormalities
9 and a left knee effusion with no significant degenerative changes.” Tr. 20 (citing Tr. 900).
10 There is no medical evidence establishing that Ms. Beverly’s arthritis or knee effusion caused a
11 significant limitation on her ability to work, and thus the ALJ did not err in finding that her knee
12 impairment was not severe.⁶

13 Ms. Beverly’s argument is even more tenuous as to obesity. Though there is no dispute
14 that, as noted by the ALJ (Tr. 19), Ms. Beverly is obese, there is no evidence or suggestion in the
15 record that her obesity led to any functional limitations. Though Ms. Beverly suggests that the
16 ALJ should have essentially assumed that the difficulties she alleged with walking and standing
17 were caused by her obesity, no evidence in the record supports that logical leap. Especially in
18 light of Ms. Beverly’s hearing testimony regarding her ability to garden for 30-40 hours per
19 week (Tr. 45-46), and given the lack of specificity with which Ms. Beverly described her

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21 ⁶ Ms. Beverly argues that the ALJ employed the wrong standard for determining whether an
22 impairment is severe (Dkt. 15 at 5-6), but as noted by the Commissioner, the Social Security
23 regulations use the same language to reference a severe impairment. *Compare, e.g.*, 20 C.F.R. §
404.1520(c) (“If you do not have any impairment or combination of impairments which
significantly limits your physical or mental ability to do basic work activities, we will find that
you do not have a severe impairment and are, therefore, not disabled.”) *with* Tr. 19-20. Thus,
Ms. Beverly has failed to establish that the ALJ applied an incorrect standard.

1 difficulties standing and walking, she has not shown that the ALJ's interpretation of the evidence
2 was unreasonable.

3 **3. The ALJ Erred in Evaluating "Other" Source Medical Evidence.**

4 Three of Ms. Beverly's treating providers were not "acceptable medical sources": case
5 manager Owen Riley, B.A.; James Nielson, MC/MSW; and Sheila Johansen, ARNP. These
6 "other" sources treated Ms. Beverly at Sound Mental Health, where Ms. Beverly received
7 counseling services, medication services, chemical dependency treatment, and case management
8 for a number of years, until transferring to a therapy program at Harborview in 2010. *See, e.g.,*
9 Tr. 236-259 (functional evaluations completed by Sound Mental Health providers, indicating she
10 has received treatment there since at least 2000), 260-263 (mental status examination notes and
11 functional evaluation completed by a Sound Mental Health provider), 293-377 (Sound Mental
12 Health treatment notes), 1004-96 (Sound Mental Health treatment notes). These providers
13 completed some functional evaluation forms, but the record also contains their treatment notes
14 from 2005-2010. Because they are "other" sources, the ALJ was required to provide germane
15 reasons to discount their opinions. *See Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217,
16 1224 (9th Cir. 2010).

17 The ALJ assigned "little weight" to all of the functional evaluations completed by the
18 Sound Mental Health providers, largely because he found the functional evaluations were based
19 primarily on Ms. Beverly's non-credible self-report. Tr. 24. The ALJ also found that because
20 Mr. Riley and Mr. Nielson completed evaluation forms in order to assist her in receiving state
21 assistance, Ms. Beverly had an incentive to exaggerate her description of symptoms and
22 complaints to them. Tr. 24. The ALJ also found that the opinions of Mr. Riley and Mr. Nielson
23 were entitled to less weight than the state agency medical consultant because they were "other"

1 sources, not “acceptable medical sources.” *Id.*

2 None of these reasons is legitimate under the circumstances of this case. First, “other”
3 sources are not to be discounted merely because of their status as “other” sources; the opinions of
4 “other” medical sources can be afforded more weight than an acceptable medical source if the
5 “other” source has seen the claimant more often and provides better support and explanation for
6 his or her opinion. *See, e.g.*, Social Security Ruling (“SSR”) 06-3p, 2006 WL 2329939, at *5
7 (Aug. 9, 2006).

8 Second, Ms. Beverly’s complaints recorded in the Sound Mental Health evaluations are
9 consistent with her complaints made during the course of her treatment; the ALJ incorrectly
10 assumed that she exaggerated her complaints at the time of evaluation in order to receive benefits
11 because she knew that the evaluations would be used in consideration of her disability
12 application. *See, e.g.*, Tr. 1042-44 (Ms. Beverly describing stress due to social situations, with
13 clinical notes regarding counseling needed for handling stress), 1047 (describing a 12-day
14 hospitalization for depression and suicidal ideation), 1064 (Ms. Beverly describing social
15 isolation and suicidal ideation after a four-day relapse, which was triggered by depression),
16 1092-93 (clinical notes regarding Ms. Beverly’s previous five hospitalizations due to depression,
17 and noting her lack of social support).

18 The ALJ also incorrectly assumed that the Sound Mental Health evaluations were based
19 primarily on Ms. Beverly’s self-report. This is not the common situation where a one-time
20 evaluator fills out an evaluation form based on whatever the claimant reports and has no other
21 information to support his or her opinions; the Sound Mental Health providers had seen Ms.
22 Beverly regularly over a number of years, and that relationship and treatment history informed
23 their opinions. They observed how she handled stressful situations such as moving (Tr. 1042,

1 1062) and conflict with family members and friends (Tr. 332, 1034, 1036); the severity of her
2 depression and suicidal ideation (Tr. 372, 1047, 1064); responses to medication (Tr. 1069); and
3 her lack of insight regarding her drug and alcohol use and depression (Tr. 261, 299, 330, 333).
4 Over the years, they also observed how Ms. Beverly is “plagued by illogical assumptions about
5 herself and her family,” and how her paranoia affects her judgment. Tr. 261. The Sound Mental
6 Health treatment records also include notes on a number of mental status exams, documenting a
7 clinician’s observations of, *inter alia*, Ms. Beverly’s attitude, thought process, and affect. *See*
8 Tr. 1022-93.

9 Moreover, the clinicians themselves did not indicate that they found Ms. Beverly’s self-
10 report to lack credibility. *See Ryan v. Comm’r of Social Sec. Admin.*, 528 F.3d 1194, 1199 (9th
11 Cir. 2008) (rejecting an ALJ’s discounting a medical opinion “by questioning the credibility of
12 the patient’s complaints where the doctor does not discredit those complaints and supports his
13 ultimate opinion with his own observations”). Instead, the Sound Mental Health practitioners’
14 extensive treatment notes explain the context for their evaluations and record their own clinical
15 observations, and thus the ALJ mischaracterized the record when he found that their evaluations
16 were based primarily on Ms. Beverly’s non-credible self-report.

17 Because none of the ALJ’s reasons for discounting the opinions of the Sound Mental
18 Health practitioners were accurate or germane, this case must be remanded for reconsideration of
19 those opinions.

20 **4. The ALJ Erred in Evaluating Dr. Coder’s Opinion.**

21 The ALJ provided only “partial weight” to the opinion of Richard Coder Jr., Ph.D., on the
22 grounds that Dr. Coder’s severe limitations were inconsistent with Ms. Beverly’s self-reported
23 daily activities. Tr. 23-24. Specifically, the ALJ pointed to Ms. Beverly’s gardening, reading,

1 computer use, and meal preparation as inconsistent with Dr. Coder's opinion that Ms. Beverly is
2 severely impaired in her ability to complete a normal workday/workweek without interruptions
3 at a constant pace, and in her ability to deal with various changes in the work setting. Tr. 24.

4 The Commissioner argues that the ALJ's interpretation of the evidence is reasonable,
5 particularly because Dr. Coder was not aware of the extent of Ms. Beverly's activities when he
6 rendered his opinion. Dkt. 16 at 11-12. The Commissioner emphasizes that Ms. Beverly's
7 "habit of spending thirty to forty hours per week working in vegetable gardens with a friend she
8 had known since high school[] was not known to Dr. Coder and, more importantly, was
9 inconsistent with the limitations he opined." Dkt. 16 at 11-12.

10 The record shows that Ms. Beverly first reported spending time gardening to a clinician
11 at Sound Mental Health in June 2009, and mentioned it again in September 2009. Tr. 1034,
12 1036. At the June 2010 administrative hearing, Ms. Beverly described the amount of time she
13 spent gardening "until about three weeks ago," but did not state when she began gardening. Tr.
14 45-46. Dr. Coder evaluated Ms. Beverly in November 2008, and there is no evidence that she
15 was gardening at that time. Thus, there is no basis in the record to conclude that Ms. Beverly
16 concealed her gardening from Dr. Coder; it appears that she may not have started gardening at
17 the time of Dr. Coder's evaluation, and it is unclear why subsequent behavior would undermine
18 an earlier evaluation, especially in light of the lack of stability in Ms. Beverly's mental health
19 during this time period.

20 Furthermore, Ms. Beverly's ability to prepare meals, use the computer, and read do not
21 have any bearing on her ability to keep a normal work schedule with interruptions at a constant
22 pace, or to deal with workplace change.⁷ Thus, the reasons provided by the ALJ for discounting

23 _____
⁷ The Court does note, however, that the ALJ accounted to some degree for Dr. Coder's opinion

Dr. Coder's are not legitimate nor supported by substantial evidence. *See Lester v. Chater*, 71 F.3d 821, 830-31 (9th Cir. 1995) ("[T]he opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record.") On remand, the ALJ shall reconsider Dr. Coder's opinion.

CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings pursuant to sentence four. On remand, the ALJ should reconsider the opinions of Sound Mental Health employees Owen Riley, James Nielson, and Sheila Johansen, and the opinion of Dr. Coder.

A proposed order accompanies this Report and Recommendation. Objections, if any, to this Report and Recommendation must be filed and served no later than **April 10, 2013**. If no objections are filed, the matter will be ready for the Court's consideration on **April 12, 2013**. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. Objections and responses shall not exceed twelve pages. The failure to timely object may affect the right to appeal.

DATED this 27th day of March, 2013.



BRIAN A. TSUCHIDA
United States Magistrate Judge

that Ms. Beverly was impaired in her ability to handle workplace change, by limiting her to a "predictable work environment" in his RFC assessment. Tr. 21.